Parkson Corp Sdn Bhd v Fazaruddin bin Ibrahim (t/a Perniagaan Fatama) and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-02–712 OF 2007 AND J-02–714 OF 2007
MOHD GHAZALI, ABU SAMAH AND SULAIMAN DAUD JJCA
18 NOVEMBER 2009

Civil Procedure — Striking out — Application to strike out action — Action for infringement of trademark — Whether limitation period had set in — Whether claim statute barred — Whether claim plain and obvious case suitable to be struck out — Whether claim frivolous and vexatious and abuse of process of court — Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c) & (d)

On 9 October 1992, the respondent applied for and became the registered owner of the Zig-Zag trademark for articles of clothing. On 7 July 1994, after the respondent applied for and was granted a trade description order ('TDO') he filed a complaint with the Ministry of Trade and Industry that the appellant had been using a similar trademark for its clothing. The appellant in turn applied for an order that the registration of the respondent's Zig-Zag trademark be expunged and that the TDO be set aside. However, that application was dismissed by the High Court and the appellant chose to withdraw its appeal against that dismissal. The respondent then applied, by way of summons in chambers, for an order to assess damages incurred by him for loss of use of his trademark with the damages so assessed to be paid by the appellant. The High Court granted the order but on appeal it was set aside by the Court of Appeal on the grounds that the High Court had no jurisdiction to make an order under s 16 of the Trade Description Act 1972 ('the TDA') to award damages. The Court of Appeal held that there could be no assessment of damages unless there was an order awarding damages. The respondent then filed the present action seeking damages against the appellant for infringement of his Zig-Zag trademark. In support of his claim of infringement, the respondent relied on the sworn affidavit of the appellant's chief operating officer admitting that the appellant had been using the Zig-Zag trademark on its articles of clothing since December 1987 until June 1994. In its defence the appellant pleaded prior use in that it had been using the Zig-Zag trademark since 1987, ie, prior to the respondent's application for registration of his trademark and that it had ceased using the trademark since 1994. The appellant also pleaded that the respondent's claim was statute barred by virtue of s 6 of the Limitation Act 1953 ('Act'). The appellant proceeded to apply to strike out the respondent's writ of summons and statement of claim under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('RHC') and/or under the inherent jurisdiction of the court. This application and the appeal against it were dismissed by the High

Court on the sole ground that the respondent's statement of claim did disclose some cause of action. Dissatisfied with this decision the appellant had filed this appeal ('the first appeal'). The appellant also applied to strike out the respondent's writ of summons and statement of claim under O 18 r 19(1)(b), (c) or (d) of the RHC and/or under the inherent jurisdiction of the court. The grounds for the application include, inter alia, the fact that the respondent's action was statute barred, frivolous and vexatious and was an abuse of the process of court. However, this application and the appeal against it were also dismissed on two grounds, namely, that this was not a plain and obvious case for striking out; and on the grounds that limitation could only be justly determined at a full trial and not summarily by affidavit evidence. The appellant again filed an appeal against that decision ('the second appeal'). The instant judgment concerns these two appeals, which arose from the same action. In respect of the second appeal, the appellant submitted that according to the respondent's pleadings, the infringement was in respect of use of the respondent's trademark between December 1987 and June 1994, which was when the appellant ceased using the said trademark. The appellant thus argued that based on the respondent's own pleading, his action was clearly barred by limitation under s 6(1)(a) of the Act because it was brought on 6 May 2004, which was six years after the date on which the cause of action accrued. The respondent submitted that on the face of it, he had a plausible claim for damages for infringement of his trademark because his pleadings had disclosed some cause for action fit for trial. As for limitation the respondent submitted that time ran from the date the appellant chose to withdraw its appeal against the High Court's dismissal of its application for an order that the respondent's Zig-Zag trademark be expunged, which was in 1999. As this action was filed on 6 May 2004, the respondent claimed his claim was not time barred. The only issue for consideration in these appeals was whether the respondent's claim was statute barred.

Held, allowing both appeals with costs here and court below:

(1) The authorities relied upon in the second appeal show that the courts had consistently taken the view that where it was clear that the defendants were going to rely on the statute of limitations and there was nothing to suggest that the plaintiffs could escape from it, then in those circumstances the claims would be struck out. In the instant case the appellant applied under O 18 r 19(1)(a), (b), (c) or (d) of the RHC for the respondent's suit to be struck out after it had entered its defence in which it had specially pleaded that the respondent's action was statute barred. It was the respondent's pleaded case that the alleged acts of infringement took place between December 1987 and June 1994, and it was never disputed that the appellant ceased using the trademark in 1994. Since the last act of infringement was in June 1994, the appellant's suit which was filed on 6 May 2004 was well outside the period of

limitation as provided by s 6 of the Act. As such the action was clearly statute barred and ought to be struck out under O 18 r 19(1)(b) and (d) of the RHC. The respondent's contention that time should run from 1999, when the appellant withdrew its appeal against the respondent, was devoid of any merit (see paras 24–25).

(2) The issue as to whether or not the appellant had infringed the respondent's trademark entitling him to damages had not been decided on its merit in prior court proceedings (see para 26).

(3) There was no averment by the respondent that the alleged infringement of his trademark had continued beyond June 1994. As it is settled law that parties are bound by their own pleadings, the respondent's action, which was filed on 6 May 2004, was barred by limitation in that it was filed almost ten years after the alleged acts of infringement. As such, the respondent's action ought to be struck out under O 18 r 19(1)(a) of the RHC because it was obviously unsustainable and did not disclose any reasonable cause of action (see paras 27–28).

[Bahasa Malaysia summary

Pada 9 Oktober 1992, responden memohon dan menjadi tuan punya berdaftar tanda dagangan Zig-Zag untuk barang pakaian. Pada 7 Julai 1994, selepas responden memohon dan diberikan perintah perihal dagangan ('PPD') dia memfailkan aduan kepada Kementerian Perdagangan dan Industri bahawa perayu telah menggunakan tanda dagangan yang sama untuk barang pakaiannya. Perayu sebaliknya memohon perintah bahawa pendaftaran tanda dagangan Zig-Zag responden dipotong dan bahawa PPD diketepikan. Walau bagaimanapun, permohonan tersebut ditolak oleh Mahkamah Tinggi dan perayu memilih untuk menarik balik rayuannya terhadap penolakan tersebut. Responden kemudiannya memohon, melalui saman dalam kamar, untuk perintah menaksir ganti rugi yang dialaminya untuk kerugian penggunaan tanda dagangannya dengan ganti rugi yang ditaksirkan tersebut dibayar oleh perayu. Mahkamah Tinggi membenarkan perintah tersebut tetapi atas rayuan ia diketepikan oleh Mahkamah Rayuan atas alasan bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk membuat perintah di bawah s 16 Akta Perihal Dagangan 1972 ('APD') untuk mengawardkan ganti rugi. Mahkamah Rayuan memutuskan bahawa tidak akan terdapat penaksiran ganti rugi kecuali terdapat perintah yang mengawardkan ganti rugi. Responden kemudiannya memfailkan tindakan ini memohon ganti rugi terhadap perayu untuk pelanggaran tanda dagangan Zig-Zagnya. Dalam menyokong tuntutannya terhadap pelanggaran, responden bergantung ke atas afidavit bersumpah ketua pegawai pengurusan perayu yang mengaku bahawa perayu telah menggunakan tanda dagangan Zig-Zag atas barang pakaiannya semenjak Disember 1987 sehingga Jun 1994. Dalam pembelaannya perayu memplid bahawa sebelum penggunaan tanda dagangan tersebut ia telah menggunakan tanda dagangan Zig-Zag semenjak 1987, iaitu sebelum permohonan responden untuk

pendaftaran tanda dagangannya dan bahawa ia telah berhenti menggunakan tanda dagangan tersebut semenjak 1994. Perayu juga memplid bahawa tuntutan responden dihalang oleh statut mengikut s 6 Akta Had Masa 1953 ('Akta'). Perayu meneruskan dengan memohon untuk membatalkan writ saman dan penyata tuntutan responden di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan/atau di bawah bidang kuasa semulajadi mahkamah. Permohonan ini dan rayuan terhadapnya ditolak oleh Mahkamah Tinggi atas satu-satunya alasan bahawa penyata tuntutan responden telah mengemukakan beberapa kausa tindakan. Tidak puashati dengan keputusan ini perayu telah memfailkan rayuan ini ('rayuan pertama'). Perayu juga memohon untuk membatalkan writ saman dan penyata tuntutan responden di bawah A 18 k 19(1)(b), (c) atau (d) KMT dan/atau di bawah bidang kuasa semulajadi mahkamah. Alasan untuk permohonan termasuk, antara lain, fakta bahawa tindakan responden dihalang statut, remeh dan menyusahkan dan penyalahgunaan proses mahkamah. Walau bagaimanapun, permohonan ini dan rayuan terhadapnya ditolak atas dua alasan, iaitu bahawa ini bukan kes yang biasa dan jelas untuk pembatalan; dan atas alasan bahawa had masa hanya boleh ditentukan secara adil di perbicaraan penuh dan bukan secara terus melalui keterangan afidavit. Perayu sekali lagi memfailkan rayuan terhadap keputusan tersebut ('rayuan kedua'). Penghakiman ini berkaitan dua rayuan ini, yang berbangkit daripada tindakan yang sama. Berkaitan rayuan kedua, perayu berhujah bahawa mengikut pliding responden, pelanggaran adalah berkaitan penggunaan tanda dagangan responden di antara Disember 1987 dan Jun 1994, di mana apabila perayu berhenti menggunakan tanda dagangan tersebut. Perayu oleh itu berhujah bahawa berdasarkan pliding responden sendiri, tindakannya jelas dihalang had masa di bawah s 6(1)(a) Akta sebab ia dikemukakan pada 6 Mei 2004, yang mana enam tahun selepas tarikh di mana kausa tindakan terakru. Responden berhujah bahawa atas fakta ini, dia mempunyai tuntutan munasabah untuk ganti rugi bagi pelanggaran tanda dagangannya kerana plidingnya telah mengemukakan beberapa kausa untuk tindakan sesuai untuk perbicaraan. Berkenaan dengan had masa, responden berhujah bahawa masa bermula dari tarikh perayu memilih untuk menarik balik rayuannya terhadap penolakan Mahkamah Tinggi terhadap permohonannya untuk perintah bahawa tanda dagangan Zig-Zag responden dibatalkan, iaitu pada 1999. Memandangkan tindakan ini difailkan pada 6 Mei 2004, responden mendakwa tuntutannya tidak dihalang oleh masa. Satu-satunya isu untuk pertimbangan di dalam rayuan-rayuan ini adalah sama ada tuntutan responden dihalang oleh statut.

Diputuskan, membenarkan kedua-dua rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Autoriti-autoriti yang digunakan di dalam rayuan kedua menunjukkan bahawa mahkamah telah secara konsisten berpendapat bahawa di mana ia jelas bahawa defendan-defendan akan bergantung ke atas statut had

masa dan tidak terdapat apa-apa untuk menyatakan bahawa plaintif-plaintif dapat mengelakkan daripadanya, oleh itu dalam keadaan ini tuntutan-tuntutan tersebut akan dibatalkan. Dalam kes ini perayu memohon di bawah A 18 k 19(1)(a), (b), (c) atau (d) KMT untuk tindakan responden dibatalkan selepas ia memasukkan pembelaannya di mana ia secara khas memplid bahawa tindakan responden adalah dihalang had masa. Ia adalah kes plid responden bahawa tindakan-tindakan pelanggaran yang didakwa berlaku di antara Disember 1987 dan Jun 1994, dan ia tidak pernah dipertikaikan bahawa perayu berhenti daripada menggunakan tanda dagangan tersebut pada 1994. Memandangkan tindakan terakhir pelanggaran adalah pada Jun 1994, tindakan perayu yang difailkan pada 6 Mei 2004 adalah di luar lingkungan had masa seperti yang diperuntukkan oleh s 6 Akta. Oleh itu tindakan tersebut jelas dihalang had masa dan patut dibatalkan di bawah A 18 k 19(1)(b) dan (d) KMT. Hujahan responden bahawa masa patut bermula dari 1999, apabila perayu menarik balik rayuannya terhadap responden, tidak mempunyai apa-apa merit (lihat perenggan 24–24).

(2) Isu sama ada atau tidak perayu telah melanggar tanda dagangan responden yang memberikannya hak kepada ganti rugi tidak diputuskan atas meritnya di dalam prosiding mahkamah yang sebelumnya (lihat perenggan 26).

(3) Tidak terdapat penegasan oleh responden bahawa pelanggaran yang didakwa terhadap tanda dagangannya berterusan melampaui Jun 1994. Memandangkan ia adalah undang-undang tetap bahawa pihak-pihak terikat dengan pliding mereka sendiri, tindakan responden, yang difailkan pada 6 Mei 2004, dihalang oleh had masa di mana ia difailkan lebih kurang 10 tahun selepas tindakan pelanggaran yang didakwa tersebut. Oleh itu, tindakan responden patut ditolak di bawah A 18 k 19(1)(a) KMT kerana ia jelas tidak dapat dikekalkan dan tidak mengemukakan apa-apa kausa tindakan yang munasabah (lihat perenggan 27–28).]

Notes

For cases on application to strike out action, see 2 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7482–7494.

Cases referred to

Alias bin Ismail v Hairuddin bin Mohamad & Anor [1997] 3 MLJ 724, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Fazaruddin bin Ibrahim v Parkson Corporation Sdn Bhd [1997] 2 CLJ 863, HC (refd)

Fazarudin bin Ibrahim v Parkson Corp Sdn Bhd (No 2) [2000] 6 MLJ 685, HC (refd)
Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases [1983] 2 MLJ 227, FC (refd)
Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1, FC (refd)
Riches v Director of Public Prosecutions [1973] 2 All ER 935; [1973] 1 WLR 1019, CA (refd)
State Government of Perak v Muniandy [1986] 1 MLJ 490, SC (refd)
Tio Chee Hing & Ors v Government of Sabah [1981] 1 MLJ 207, FC (refd)

Legislation referred to

Limitation Act 1953 s 6, 6(1)(a)
Public Authorities Protection Act 1948 s 2(a)
Rules of the High Court 1957 O 25 r 4
Rules of the High Court 1980 O 18 r 19(1)(a), (1)(b), (c), (d), (2),
Trade Descriptions Act 1972 s 16
trademarks Act 1976 ss 30, 40(1)(c)
trademarks Regulations 1983 Third Schedule

Appeal from: Civil Suit No MT3–22–389 of 2004 (High Court, Johor Bahru)

Bahari Yeow (Lee Hishamuddin Allen & Gledhill) for the appellant.
Matthews George (Brian Komathi & Partners) for the respondent.

Abu Samah JCA (delivering judgment of the court):

[1] There were two appeals before us, namely Civil Appeal No J-02–712 of 2007 ('the first appeal') and Civil Appeal No J-02–714 of 2007 ('the second appeal'). They arose out of the same action. The first appeal was against the decision of the High Court dismissing with costs the appellant's appeal to the judge in chambers against the decision of the deputy registrar in dismissing the appellant's application to strike out the respondent's writ of summons and statement of claim under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('RHC') and/or under the inherent jurisdiction of the court.

[2] The second appeal was against the decision of the High Court dismissing with costs the appellant's appeal to the judge in chambers against the decision of the deputy registrar in dismissing the appellant's application to strike out the respondent's writ and statement of claim under O 18 r 19(1)(b), (c) or (d) of the RHC and/or under the inherent jurisdiction of the court.

[3] Briefly the facts are as follows. The respondent is the owner of a trademark under the name and style 'ZIG-ZAG' which was registered in class 25 for articles of clothing under the Third Schedule of the trademarks

Regulations 1983. Although the certificate of registration of the said trademark was issued on 18 December 1993 it was, by virtue of s 30 of the trademarks Act 1976 ('the Act') deemed registered on 9 October 1992, being the date of application for registration.

[4] The appellant had been using a similar trademark for its clothings since 1987 and prior to the registration of the respondent's trademark.

[5] Pursuant to the registration of his trademark, the respondent applied by way of an ex parte originating motion at the High Court, Johor Bahru for a Trade Description Order ('TDO') under s 16 of the Trade Descriptions Act 1972 ('TDA 1972'). It was granted on 7 July 1994. It then filed a complaint with the Ministry of Trade and Industry who subsequently raided the appellant's premises and seized the appellant's goods bearing the trademark, 'ZIG-ZAG'.

[6] The appellant responded by filing a notice of motion at the High Court, Johor Bahru to expunge the registration of the respondent's trademark, set aside the TDO and that damages be assessed by the registrar. It was however dismissed on 23 October 1996. The appellant appealed to this court but later withdrew it.

[7] Consequently the respondent filed a summons in chambers for an order for assessment of damages incurred by him for the loss of use of his trademark 'ZIG-ZAG' as a result of the alleged infringement of his trademark by the appellant. The High Court allowed the application and ordered that damages be assessed by the registrar, an account of profits be taken and that the profits be paid to the respondent.

[8] The appellant then appealed to the Court of Appeal against the said order. On 10 April 2002 this court allowed the appeal on the ground that the High Court has no jurisdiction to make an order awarding damages in an application for a TDO under s 16 of the TDA 1972.

[9] It was as a result of that decision that the respondent filed the present action seeking damages against the appellant for infringement of his trademark. The basis of the respondent's cause of action is as stated in para 13 of his statement of claim. The particulars of the alleged infringement as stated in the said paragraph were derived from a sworn affidavit by the appellant's chief operating officer admitting that it had been using the 'ZIG-ZAG' trademark on its articles of clothing since December 1987 and until June 1994 with an annual total value of sales as follows:

YEAR			TOTAL
December 1987	—	June 1988	RM 89,550
July 1998	—	June 1989	RM 245,963
July 1989	—	June 1990	RM 180,860
July 1990	—	June 1991	RM 1,374,244
July 1991	—	June 1992	RM 1,440,739
July 1992	—	June 1993	RM 1,081,253
July 1993	—	June 1994	**RM 1,009,369**
TOTAL			**RM 5,421,978**

[10] The respondent claimed that by reason of the said infringement he had suffered damages and his customers had lost faith on the originality of his products bearing the trademark 'ZIG-ZAG'.

[11] The appellant in its defence pleaded 'prior use' in that it had been using the said trademark since 1987, that is, prior to respondent's application for registration of his trademark. Further, it had ceased using the trademark in 1994.

[12] The appellant also pleaded that the respondent's claim is statute barred by virtue of s 6 of the Limitation Act 1953.

[13] The High Court dismissed the first appeal on the sole ground that the respondent's statement of claim did disclose some cause of action or raise some question fit for trial. The High Court observed that in an application under O 18 r 19(1)(a) of the RHC one only looks at the statement of claim to decide whether the respondent's claim in obviously unsustainable as no affidavit evidence is admissible: see O 18 r 19(2) of the RHC. He held that the issues raised by the appellant regarding 'prior use' of the said trademark and limitation were not sustainable as evidence by affidavits was not admissible.

[14] The second appeal was dismissed on two grounds. First, this was not a plain and obvious case for striking out: see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36. The learned judge was of the view that the respondent's contention that the issue relating to infringement had been adjudicated in prior court proceedings, namely in *Fazaruddin bin Ibrahim v Parkson Corporation Sdn Bhd* [1972] 2 CLJ 863, and *Fazarudin bin Ibrahim v Parkson Corp Sdn Bhd (No 2)* [2000] 6 MLJ 685 has merit. Secondly, the issue on limitation could only be justly determined at a full trial after hearing witnesses and not summarily by affidavit evidence.

[15] I propose to deal with the second appeal first as the application under O 18 r 19(1)(b), (c) or (d) of the RHC is supported by affidavit evidence. The grounds for the application as listed in the summons in chambers include, inter alia, that the respondent's action is statute barred, it is frivolous and vexatious and is an abuse of the process of court. The affidavit in support sworn by its chief operating officer deposed that the appellant had been using its trademark 'ZIG-ZAG' similar to that of the respondent since 1987, long before the respondent registered his trademark in October 1992. The particulars and the approximate annual value of sales of its garments are as pleaded in para 13 of the respondent's statement of claim. The appellant also exhibited copies of invoices bearing the said mark dating from 14 October 1987 and copies of advertisements for clothing bearing the said mark since 1987.

[16] Learned counsel for the appellant submitted that the respondent's cause of action for infringement was based on the particulars of alleged infringement as specified in para 13 of his statement of claim. The alleged infringement was in respect of use of the respondent's trademark between December 1987 and June 1994. The appellant ceased using the trademark in 1994. This action was filed on 6 May 2004. Section 6(1)(a) of the Limitation Act 1953 of the states that no actions founded on a contract or tort shall be brought after the expiration of six years from the date on which the cause of action accrued. As such based on the respondent's own pleading, his action was clearly barred by limitation: see *Tio Chee Hing & Ors v Government of Sabah* [1981] 1 MLJ 207, *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227, *Alias bin Ismail v Hairuddin bin Mohamad & Anor* [1997] 3 MLJ 724, *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1.

[17] As regards 'prior use', the appellant relied on s 40(1)(c) of the Act which states:

> Notwithstanding anything contained in this Act, the following acts do not constitute an infringement of a trademark —
>
> (c) the use by a person of a trademark in relation to goods or services in respect of which he has by himself … continuously used the trademark from a date before —
>
> (i) the use of the registered trademark by the registered proprietor …; or
>
> (ii) the registration of the trademark,
>
> whichever is the earlier.

[18] Learned counsel for the respondent submitted that a perusal of the statement of claim would clearly show that on the face of it the respondent has a plausible claim for damages for infringement of his trademark. It is not

obviously unsustainable. As long as it discloses some cause of action fit for trial that would suffice, even if the claim is weak and not likely to succeed: see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd*. As for limitation, it was submitted that time run from the date the appellant withdrew its appeal, that is, in 1999. As this action was filed on 6 May 2004, the respondent's claim is not time barred. In any event, the High Court was correct in holding that the issue on limitation should be ventilated at the trial.

[19] In our view, the only issue which merits consideration is limitation. The outcome of these appeals depends on whether the respondent's claim is statute barred. It is thus necessary to look at the cases relied upon by learned counsel for the appellant.

[20] In *Tio Chee Hing & Ors v Government of Sabah* the appellants sued the Government of Sabah for loss of income from a piece of land of area 3,280 acres which they quantified as RM44m odd or alternatively for RM13.2m for the value of the land as a coconut plantation and the value of timber thereon. The alleged breach occurred more than six years prior to the filing of the suit. The Government of Sabah, without entering an appearance and filing its defence, applied to strike out that statement of claim under O 25 r 4 of the Rules of the High Court 1957 and under the inherent jurisdiction of the High Court on the grounds that (a) it disclosed no cause of action, (b) it was frivolous and vexatious and an abuse of the process of the court and (c) the claim was statute barred. The trial judge held that the claim was statute barred and the appellants appealed. The Federal Court dismissed the appeal and held that where it was clear that the defendant was going to rely on the statute of limitations and there was nothing before the court to suggest that the plaintiffs could escape from it the claim would be struck out. Chang Min Tat FCJ in his judgment quoted a passage in *Riches v Director of Public Prosecutions* [1973] 2 All ER 935 wherein Davies LJ at p 939 said:

> In the light of those more recent authorities I think, as I say, that perhaps the observations of this court in *Dismore v Milton* went too far. I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle, I cannot see why not. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail.

[21] The Federal Court in *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227 reaffirmed its decision in *Tio Chee Hing & Ors v Government of Sabah*. There the appellants filed suits against the Menteri Besar, the State Secretary and the Government of

Kelantan alleging that their dismissal as *penghulus* was unconstitutional and unlawful. The respondents did not file any defence but applied for the writ to be struck out on the grounds that it disclosed no reasonable causes of action, was frivolous, vexatious, irregular, null and void and that it was otherwise an abuse of the process of the court. It was averred that the actions were filed too late as they were statute barred by the Public Authorities Protection Act 1948. The writs were struck out and the appellants appealed. The Federal Court dismissed the appeal and held that where it was clear that the defendants were going to rely on limitation and there was nothing before the court to suggest that the plaintiffs could escape from it the claim would be struck out.

[22] A similar situation arose in *Alias bin Ismail v Hairuddin bin Mohamad & Anor* [1997] 3 MLJ 724. There, the appellant sued the officer in charge of the Police District, Segamat and the government of Malaysia for malicious prosecution after the charge against him for theft had been withdrawn in 1988. The suit was filed nine years later. The defendants did not file their defence. Instead they applied to strike out the suit under O 18 r 19(1) of the RHC on the ground that it did not disclose a reasonable cause of action because it was statute barred by virtue of s 2 of the Public Authorities Protection Act 1948. The High Court struck out the suit. The appellant appealed to this court. It was dismissed. Abdul Malek Ahmad JCA, at p 728 held that, 'The Court has no discretion to set aside a defence of limitation. In *Riches v Director of Public Prosecutions* [1973] 1 WLR 1019, it was held that it was open to the defendant on an application to dismiss an action as being frivolous and vexatious or an abuse of the process of the court to show that the plaintiff's cause of action was statute barred and must inevitably fail for that reason'. At p 729, His Lordship concluded, 'On the limitation point alone, therefore, we saw no merit in the appeal'.

[23] The most recent case in point is *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1. In that case the respondents claimed general and special damages against the appellants for negligence, breach of fiduciary duties, breach of statutory duties, negligent misstatement, fraud etc. The respondents alleged that the appellants did not act fast enough in containing the outbreak of Japanese encephalitis (JE)/nipah virus, which led to the respondents suffering injury. The appellants then applied to strike out the writ of summons and statement of claim under O 18 r 19(1)(a), (b), (c) and (d) of the RHC, after having entered a conditional appearance but without filing their defence. The senior assistant registrar allowed the application, which was affirmed by the learned judge. The respondents appealed to the Court of Appeal. The appeal was allowed. The appellants obtained leave to appeal to the Federal Court. One of the questions posed to the Federal Court was whether the action of the appellants in applying to strike out the writ and statement of claim which is barred by s 2(a) of the Public Authorities Protection Act 1948 was fit and

proper. The Court of Appeal held that the defence of limitation must be pleaded. The Federal Court disagreed and held that the respondents action was time barred as the alleged events occurred before 1 March 1999, whereas the suit was filed on 20 March 2002, well beyond the three years limitation period allowed by s 2(a) of the Public Authorities Protection Act 1948. The Federal Court at p 16 said:

> Likewise, in the present action, it was clear that the appellants were going to rely on limitation and there was no way that the respondents could have escaped from it. Thus, a defendant on an application to strike out pleadings and indorsements under O 18 r 19(1) of the RHC is entitled to raise limitation of action without pleading a defence and filing it to the effect. Similarly, in the present case, the appellants were entitled to do the same, and since the respondents' action was clearly statute barred, the action was therefore properly struck out.

[24] The above cases show that our courts had consistently taken the view that where it was clear that the defendants were going the rely on the statute of limitations and that there was nothing before the court to suggest that the plaintiffs could escape from it the claims would be struck out. In all the above cases the applications to strike out the plaintiffs' claims were made before the defendants filed their defence.

[25] The case before us was even stronger. The applications under O 18 r 19(1)(a), (b), (c) or (d) of the RHC were made after the appellant had entered its defence and specially pleaded that the respondent's action was statute barred. It was the respondent's pleaded case that the alleged acts of infringement took place between December 1987 and June 1994. The appellant, in its defence stated that it had ceased using the trademark in 1994, a fact which was never disputed by the respondent. The last alleged act of infringement was in June 1994. This action was filed on 6 May 2004, which was well outside the period of limitation the action is clearly statute barred and ought to be struck out under O 18 r 19(1)(b) and (d) of the RHC. The respondent's contention that time should run from the date the appellant withdrew its appeal is devoid of any merit as the appellant had ceased using the said trademark in 1994.

[26] The respondent's contention before the High Court that the issue relating to infringement of the trademark had been duly adjudicated in prior court proceedings: see *Fazaruddin bin Ibrahim v Parkson Corp Sdn Bhd* and *Fazarudin bin Ibrahim v Parkson Corp Sdn Bhd (No 2)* which found favour with the learned judge, was fallacious or misconceived. The first case was only an application by the appellant by notice of motion, inter alia, for an order that the registration of the respondent's trademark be expunged and that the TDO be set aside. That was dismissed. The second case was an application by the respondent by way of a summons in chambers for an order to assess damages

incurred by him for loss of use of his trademark and that the damages so assessed be paid by the appellant. The High Court granted the order but it was set aside by the Court of Appeal on the ground that the High Court has no jurisdiction to make an order under s 16 of the TDA 1972 to award damages. The Court of Appeal held that there can be no assessment of damages unless there was an order awarding damages. Therefore the issue whether or not the appellant had infringed the respondent's trademark entitling him to damages had not been decided on its merit in both cases.

[27] It is now time to deal with the first appeal. An application under O 18 r 19(1)(a) of the RHC must be decided solely on the pleading itself. No affidavit evidence is admissible: see O 18 r 19(2) of the RHC. Here the court looks at the statement of claim itself to see whether it discloses no reasonable cause of action. It has been said that so long as the pleading disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleading to be struck out: see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd*.

[28] Here, the respondent's cause of action for damages is based on alleged infringement of his trademark by the appellant between December 1987 and June 1994. There was no averment that the said alleged infringement continued beyond June 1994. It stopped in June 1994. The respondent, by so pleading had consciously or unconsciously, sealed his own fate. It is settled law that parties are bound by their own pleadings: see *State Government of Perak v Muniandy* [1986] 1 MLJ 490. As this action was filed on 6 May 2004, almost ten years after the alleged acts of infringement, the respondent's claim is barred by limitation. It is obviously unsustainable and does not disclose any reasonable cause of action.

[29] The outcome is thus inevitable. For the foregoing reasons, we allowed both appeals with costs here and below. The deposits are to be returned to the appellant.

Appeals allowed with costs here and below.

Reported by Kohila Nesan